IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
October 25, 2007

HELEN C. SWANSON v. KNOX COUNTY, TENNESSEE

Appeal from the Circuit Court for Knox County
No. 2-398-05 Harold Wimberly, Judge

No. E2007-00871-COA-R3-CV - FILED NOVEMBER 20, 2007

This case presents the issue of the applicability of Tenn. Code Ann. § 8-8-302 to a suit against a county government based on the failure of one or more of its deputy sheriffs to perform an administrative task. Ms. Swanson applied for a job with a hospital, and at the request of the hospital, the county sheriff's department issued a criminal background report on Ms. Swanson which contained some erroneous information. The sheriff's department corrected and reissued the report but failed to send the hospital a letter of explanation. Ms Swanson sued the county for damages pursuant to Tenn. Code Ann. § 8-8-302 . The trial court granted the county's motion for summary judgment. Upon review, we affirm. Ms. Swanson's suit for the "inaction" of various sheriff's deputies is a suit for negligence, which is controlled by the Tennessee Governmental Tort Liability Act, not Tenn. Code Ann. §§ 8-8-301, et seq. No relief is available under Tenn. Code Ann. § 8-8-302, because the "act" complained of, i.e. failure to write an explanatory letter, is not an intentional act of misconduct for which the statute affords relief.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Affirmed

SHARON G. LEE, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and CHARLES D. SUSANO, JR., J., joined.

Ursula Bailey, Knoxville, Tennessee, for the Appellant, Helen C. Swanson.

Mary Ann Stackhouse, Chief Deputy Law Director and Robert C. McConkey III, Knoxville, Tennessee, for the Appellee, Knox County, Tennessee.

OPINION

I. Background

Because we are reviewing a grant of summary judgment to the defendant Knox County, we review the facts in the light most favorable to the plaintiff, Helen Swanson. ***Robinson v. Omer***, 952

S.W.2d 423, 426 (Tenn. 1997). In January 2004, Ms. Swanson completed an online application for a nursing position with Baptist Hospital. After completing an interview, Ms. Swanson was offered a position as a certified nursing assistant. During a second meeting on January 26, 2004, Ms. Swanson was required to complete employment and tax paperwork, undergo blood and drug tests, and consent to a background check. At the close of this meeting, Ms. Swanson was instructed to report for orientation. However, two days before orientation, Ms. Swanson received a telephone call from a hospital employee instructing her not to report for orientation because her background check showed a conviction for disorderly conduct in Knox County, Tennessee. Ms. Swanson informed the caller that she had never been charged with this offense and asked how to clear her record. The caller instructed Ms. Swanson to have the Knox County Sheriff's Department ("the Sheriff's Department") provide proof that these convictions were not actually Ms. Swanson's.

After contacting the Sheriff's Department, Ms. Swanson learned that the disorderly conduct charge belonged to her husband's sister, also named Helen Swanson. After acknowledging that a mistake had been made, the Sheriff's Department provided Ms. Swanson with a public copy of her report that omitted the charge of disorderly conduct. Ms. Swanson took the report to the hospital but was informed that the report was insufficient and a written explanation of the mistake was required. Ms. Swanson requested a written explanation from an employee of the Sheriff's Department and was assured that she would receive some documentation as soon as the Sheriff's Department was able to correct the problem. After a few days, Ms. Swanson again contacted the Sheriff's Department but received no response. Over the next several days, Ms. Swanson continually requested the report. At some point later, the Sheriff's Department informed her that she would need to be fingerprinted and photographed in order to distinguish her from the "Helen Swanson" that was convicted of disorderly conduct. After Ms. Swanson was fingerprinted and photographed, the Sheriff's Department informed her that she would be contacted once her record was cleared.

A few days later, Ms. Swanson called the Sheriff's Department but was told that the information needed was in storage. After two days, Ms. Swanson had not heard anything and again called the Sheriff's Department to request a document explaining that she was not the "Helen Swanson" convicted of disorderly conduct. Ms. Swanson explained to Sgt. Terry Wilshire of the Sheriff's Department that not having the requested document was delaying her employment. Sgt. Wilshire stated that he did not understand why the file was delayed and that getting the statement should not be a problem. Sgt. Wilshire promised Ms. Swanson a written statement addressed to the hospital explaining the mistake. Ms. Swanson then informed Baptist Hospital that she had contacted the Sheriff's Department and was waiting to receive a letter from them.

Lt. Fred Ludwig, the custodian of the records for the Sheriff's Department, is the only person with the Sheriff's Department who writes this type of letter. Lt. Ludwig stated that while the Sheriff's Department does generate letters of this nature, Lt. Ludwig's policy is to not provide a letter unless under special circumstances or if someone "really demanded it." Deputy William Webb was also aware that Ms. Swanson needed a written explanation for Baptist Hospital and passed on her request to Sgt. George Webster explaining that Ms. Swanson needed the document for a prospective job.

On February 17, 2004, Ms. Swanson delivered a cover letter and a "Criminal History Record" to the human resources department of Baptist Hospital but did not speak to anyone at the hospital when she delivered the documents. The cover letter indicated that Baptist Hospital could contact Sgt. Wilshire for further information at a provided phone number. Ms. Swanson then received a letter dated February 25, 2004, that stated:

> After review of the information that you submitted to Baptist on February 17, 2004, and further consideration of your response, we regret to inform you that we are unable to further consider you for employment at this time. Our decision, in part, is the result of the information obtained through the Consumer Reporting Agency identified below, as well as the information you submitted on your employment application.

Ms. Swanson called Baptist Hospital and was informed that her employment was being denied due to the time it was taking her to get the information requested and the need to fill the position. The hospital did not question Ms. Swanson about any issue on her application except for the criminal history.

II. Issues

Since Ms. Swanson's original and amended complaints relied solely on Tenn. Code Ann. § 8-8-302 for relief and did not allege negligence as a basis for relief, the dispositive issues in this appeal are:

1) Whether the trial court erred by not stating the legal grounds upon which the court granted the motion for summary judgment.

2) Whether the trial court erred in granting Knox County's motion for summary judgment pursuant to Tenn. Code Ann. § 8-8-302.

III. Analysis

A. Standard of Review

Summary judgment is appropriate only when the moving party demonstrates that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04. When reviewing a motion for summary judgment, this Court is required to view the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in the nonmoving party's favor. *See* ***Robinson v. Omer***, 952 S.W.2d 423, 426 (Tenn. 1997); ***Byrd v. Hall***, 847 S.W.2d 208, 210-11 (Tenn. 1993). The burden of proof rests with the moving party, who must establish that its motion satisfies these requirements. ***Staples v. CBL & Associates, Inc.***, 15 S.W.3d 83, 88 (Tenn. 2000). If the moving party makes a properly supported motion, the burden shifts to the nonmoving party to establish the existence of disputed material facts. ***Id.*** (citing ***Byrd***, 847 S.W.2d at 215). If, however, the moving party fails to make a properly supported motion, "the non-moving party's burden to produce evidence establishing the existence

of a genuine issue for trial is not triggered and the motion for summary judgment must fail." ***Staples***, 15 S.W.3d at 88.

The standards governing the assessment of evidence in the summary judgment context are well established. Trial courts are obligated to consider pleadings, depositions, answers to interrogatories, admissions, and affidavits, to the extent that these are part of the record, in determining whether summary judgment should be granted. *See* ***AmSouth Bank v. Soltis***, No. E2005-00452-COA-R3-CV, 2005 WL 360146,0 at *2 (Tenn. Ct. App. E.S., filed Dec. 29, 2005); Tenn. R. Civ. P. 56.04. Summary judgment is appropriate only when the facts and the inferences to be drawn from the facts permit a reasonable person to reach only one conclusion. *See* ***McCall v. Wilder***, 913 S.W.2d 150, 153 (Tenn. 1995); ***Carvell v. Bottoms***, 900 S.W.2d 23, 26 (Tenn. 1995).

B. Tenn. R. Civ. P. 56.04

Ms. Swanson argues that the trial court failed to specify the legal grounds upon which it granted Knox County's motion for summary judgment. At the time of the hearing, Tenn. R. Civ. P. 56.04 stated in pertinent part, "Upon request, the trial court shall state the legal grounds upon which the court grants the motion, which shall be included in the order reflecting the court's ruling." Tenn. R. Civ. P. 56.04 (2006).[1] Neither party requested that the trial court state the legal grounds upon which the motion was granted. Even though Knox County included four legal grounds[2] in its motion for summary judgment, Ms. Swanson based her claim solely on Tenn. Code Ann. § 8-8-302, and only one of Knox County's grounds addressed that statute. Therefore, the trial court's legal grounds must necessarily be based on Knox County's argument pertaining to Tenn. Code Ann. § 8-8-302. We find this issue to be without merit.

C. Tenn. Code Ann. § 8-8-302

The factual basis for Ms. Swanson's suit against Knox County is that one or more deputy sheriffs failed to write a letter to Ms. Swanson's prospective employer explaining an erroneous criminal background report. Ms. Swanson alleges that this "inaction" on the part of Knox County caused her to sustain damage and injury. Relief was sought pursuant to Tenn. Code Ann. § 8-8-302 which provides:

> *Anyone incurring any wrong*, injury, loss, damage or expense *resulting from any act or failure to act on the part of any deputy* appointed by the sheriff may bring suit against the county in which the sheriff serves; provided, that the deputy is, at the time of such occurrence, acting by virtue of or under color of the office.

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[1]Effective July 1, 2007, Rule 56.04 was amended to require the trial court to state the grounds for denying or granting summary judgment. Rule 56.04 now states in pertinent part, "The trial court shall state the legal grounds upon which the court denies or grants the motion, which shall be included in the order reflecting the court's ruling." Tenn. R. Civ. P. 56.04 (2007).

[2]Knox County raised four legal grounds for summary judgment: (1) the Governmental Tort Liability Act under Tenn. Code Ann. § 29-20-205; (2) the Public Duty Doctrine; (3) the principals of negligence not being satisfied; and (4) lack of an underlying cause of action that would allow recovery under Tenn. Code Ann. § 8-8-302.

Tenn. Code Ann. § 8-8-302 (2002) (emphasis added). Ms. Swanson argues that the clear wording of Tenn. Code Ann. § 8-8-302 compels a ruling in her favor since she incurred a wrong, *i.e.* was not hired, as a result of a failure to act on the part of any deputy, *i.e.* failure by Knox County deputies to write an explanatory letter.

The issue we must resolve is whether Tenn. Code Ann. § 8-8-302 affords relief to a plaintiff who has been harmed by a deputy sheriff's failure to write a explanatory letter to a prospective employer upon request.

We look to various decisions from the appellate courts for guidance. We begin with ***O'Neal v. DeKalb Co.***, 531 S.W.2d 296 (Tenn. 1975), in which the Tennessee Supreme Court noted that actions for *misconduct* of deputies are brought under Tenn. Code Ann. § 8-8-302 and actions for *negligence* are brought under the provisions of the Tennessee Governmental Tort Liability Act, Tenn. Code Ann. § 29-20-101, et seq., ("GTLA").

Later, the Supreme Court in ***Jenkins v. Loudon Co.***, 736 S.W.2d 603 (Tenn. 1987)[3], examined the interplay between the GTLA and Tenn. Code Ann. §§ 8-8-301, et seq. The Court stated that "generally no inconsistency exists between the scope of the remedies provided by the GTLA for certain unintentional torts and that of Tenn. Code Ann. §§ 8-8-301, et seq., for the official misconduct of deputies, except to the extent that these latter statutes could extend to actions for negligence." ***Id.*** at 610. The Court concluded that the "general provisions of the GTLA do not supercede the specific provisions of Tenn. Code Ann. §§ 8-8-301, et seq., as they relate to misconduct of sheriff's deputies, except to the extent that Tenn. Code Ann. §§ 8-8-301, et seq., could extend to actions for negligence under Tenn. Code Ann. § 29-20-205." ***Id.*** at 609. Stated another way, the Court ruled that the GTLA supercedes Tenn. Code Ann. §§ 8-8-301, et seq., as it relates to actions based on negligence, but Tenn. Code Ann. §§ 8-8-301, et seq., controls as to suits for misconduct of officers.

In ***Hensley v. Fowler***, 920 S.W.2d 649 (Tenn. Ct. App. 1995), the Court of Appeals affirmed the trial court's dismissal of a wrongful death negligence action against the Sheriff of Knox County. The court ruled that because the action was based on negligence, a cause of action did not arise under Tenn. Code Ann. §§ 8-8-301, et seq. In reaching this decision, the court construed ***Jenkins*** to limit actions that arise under Tenn. Code Ann. §§ 8-8-301, et seq., to non-negligent causes of action. In accord with this decision is ***Warnick v. Carter County*****,** No. E2002-00833-COA-R3-CV, 2003 WL 174754 (Tenn. Ct. App. E.S., filed Jan. 27, 2003), a negligence action filed by a plaintiff seeking damages arising from an automobile accident involving a deputy sheriff. Suit was filed within a year, nonsuited and refiled within one year of the voluntary dismissal, but more than four years after the accident. ***Id.*** Since GTLA actions are not "saved" by the savings statute, ***Lynn v. City of Jackson***, 63 S.W. 3d 332, 337 (Tenn. 2001), the plaintiffs could not maintain a GTLA action and

[3]The decision in ***Jenkins*** was abrogated by the subsequent decision in ***Limbaugh v. Coffee Medical Center*****,** 59 S.W. 3d 73 (Tenn. 2004), which held that Tenn. Code Ann. § 29-20-205 of the GTLA does not remove immunity for *all* intentional torts but only removes immunity for injuries proximately caused by the negligent act or omission of a governmental employee when the injury arises out of only those specified torts enumerated in subsection (2) of Tenn. Code Ann. § 29-20-205.

could only proceed under Tenn. Code Ann. §§ 8-8-301, et seq., which does not have a limitations period. The issue before the Court was whether plaintiff's claim for negligence fell under the GTLA or under Tenn. Code Ann. § 8-8-302. ***Warnick*****,** 2003 WL 174754. After reviewing ***Jenkins***, the Court concluded that "the plaintiff's cause of action, *being an action for negligent operation of an automobile by a regular deputy sheriff in the course and scope of his employment*, is controlled by the GTLA, which supercedes Tenn. Code Ann. §§ 8-8-301, et seq., as to such conduct." ***Id.*** at *3.

This issue then becomes whether the action complained of is an act of negligence or an intentional act of misconduct. Based on the reasoning of ***O'Neal***, ***Jenkins***, ***Hensley***, and ***Warnick***, we hold that the plaintiff's suit for the "inaction" of various sheriff's deputies is a suit for negligence, which is controlled by the GTLA, not Tenn. Code Ann. §§ 8-8-301, et seq. No relief is available under Tenn. Code Ann. § 8-8-302 because the "act" complained of, i.e. failure to write an explanatory letter, is not an intentional act for which the statute affords relief. Cases of official misconduct where Tenn. Code Ann. § 8-8-302 has provided a basis for relief include those involving a school resource officer who purchased alcohol and drugs then sexually assaulted a student, ***Watts v. Maury County***, No. M2001-02768-COA-R3-CV, 2003 WL 1018138, at *1 (Tenn. Ct. App. M.S., Sept. 2, 2003), and a county medical examiner who drugged a young man that was accompanying him to observe his job in order to photograph him in the nude, ***Doe v. Pedigo****,* No. E2002-01311-COA-R3-CV, 2003 WL 21516220, (Tenn. Ct. App. E.S., Jan. 26, 2004). The case before us does not involve a "non-negligent" act, but rather a negligent act or omission to act, and therefore, Tenn. Code Ann. § 8-8-302 is not applicable.

Cases alleging negligence by a governmental entity are brought pursuant to the GTLA. Ms. Swanson did not pursue relief under the GTLA and even if she had, her cause of action would have been time-barred. *See* Tenn. Code Ann. § 29-20-305(b). The alleged wrongful conduct of Knox County occurred in February of 2004. Suit was filed on July 22, 2005, well beyond the statutory one-year period of limitations for suits under the GTLA.

Ms. Swanson argues that Tenn. Code Ann.§ 8-8-302 is a strict liability statute that affords relief for any acts of any deputy for any wrongs sustained. She cites as authority ***Orren v. Carlton,*** 1998 WL 57551, at *2 (Tenn. Crim. App. Feb. 13, 1998), that provides that a crime that does not require a mens rea element is one of strict liability. Criminal strict liability is defined as "[a] crime that does not require a mens rea element, such as traffic offenses and illegal sales of intoxicating liquor." BLACK'S LAW DICTIONARY 400 (8th ed. 2004). Knox County, however, is not being prosecuted for a crime, and there is a distinction between criminal strict liability and strict liability in tort. Strict liability in tort is defined as "[l]iability that does not depend on actual negligence or intent to harm, but that is based on the breach of an *absolute duty* to make something safe. Strict liability most often applies either to ultrahazardous activities or in products-liability cases." BLACK'S LAW DICTIONARY 934 (8th ed. 2004) (emphasis added).

The intent of the General Assembly was not to make counties strictly liable for every "wrong, injury, loss, damage or expense" resulting from actions or inactions for which the deputy does not have an official duty, but rather to shift liability from the sheriff to the county which effectively was only a "partial revocation of the [c]ounty's absolute immunity for the acts of its officers in the discharge of their official duties." ***Doe v. May***, No. E2003-1642-COA-R3-CV, 2004 WL 1459402,

at *2 (Tenn. Ct. App. E.S., filed on June 29, 2004). If Tenn. Code Ann. § 8-8-302 imposed strict liability on the Sheriff's Department, the deputies would be charged with being the absolute insurer of every citizen's job, finances, and welfare. In construing the General Assembly's intent, courts should presume that the General Assembly did not intend an absurdity and thus, should avoid construing statutes to produce absurd results. ***State ex rel. Com'r of Transp. v. Medicine Bird Black Bear White Eagle***, 63 S.W.3d 734, 757 (Tenn. Ct. App. 2001) (citing ***Barnett v. Barnett***, 27 S.W.3d 904, 908 (Tenn. 2000); ***Fletcher v. State***, 951 S.W.2d 378, 382 (Tenn. 1997); ***Wachovia Bank of North Carolina, N.A. v. Johnson***, 26 S.W.3d 621, 627 (Tenn. Ct. App. 2000)).

Ms. Swanson also argues that since a deputy promised her an explanatory letter, he was under an affirmative duty to act and immunity is removed under the public duty doctrine. We disagree. The public duty doctrine originated at common-law and shields a public employee from suits for injuries that are caused by the public employee's breach of a duty owed to the public at large. ***Ezell v. Cockrell***, 902 S.W.2d 394, 397 (Tenn. 1995). It is an affirmative defense that serves as an extra layer of protection that a government entity may assert when it is not otherwise protected by the immunity afforded under the GTLA. ***Hurd v. Flores***, 221 S.W.3d 14, 27 (Tenn. Ct. App. 2006); ***Wells v. Hamblen County***, No. E2004-01968-COA-R3-CV, 2005 WL 2007197, at *2-3 (Tenn. Ct. App. E.S., filed on Aug. 22, 2005); *see also* ***Chase v. City of Memphis***, 971 S.W.2d 380, 385 (Tenn. 1998); ***Matthews v. Pickett County***, 996 S.W.2d 162, 164-65 (Tenn. 1999); ***Brown v. Hamilton County***, 126 S.W.3d 43, 46 (Tenn. Ct. App. 2003). The public duty exception does not come into play because Ms. Swanson did not proceed with a negligence theory under the GTLA, and in any event, the exception does not afford her a basis for relief.

IV. Conclusion

For the reasons stated herein, the judgment of the trial court is affirmed. Costs of appeal are assessed to the appellant, Helen C. Swanson.

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SHARON G. LEE, JUDGE